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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

RESERVE LIFE INSURANCE COMPANY,

Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

JURISDICTIONAL STATEMENT

Appellant Reserve Life Insurance Company appeals from an order of the Supreme Court of Ohio dismissing the appeal of Appellant from the Court of Appeals, First Appellate District, State of Ohio, and from the judgment of the latter Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio appears in 175 Ohio St. 468 and 196 N.E.2d 87. The opinion of the Court of Appeals, First Appellate District, State of Ohio, appears at 196 N.E. 2d 114. Both opinions are set out in the Appendix at p. 1a and p. 4a.

JURISDICTION

The statutes of Ohio levy upon foreign insurance companies a tax on personal property used in business, but do not levy this or any other personal property tax upon domestic insurance companies. When the State of Ohio sought to collect the personal property tax from Reserve Life Insurance Company, an insurance company organized and operating under the laws of the State of Texas, Reserve protested against the levy and collection of said tax on three grounds:

1. That the proper construction of Ohio statutes gave a value of zero to the personal property of Reserve Life Insurance Company, and that, consequently, no tax was due.
2. That levying the personal property tax upon foreign insurance companies and not domestic insurance companies is a violation of the Ohio Constitution.
3. That levying the personal property tax upon foreign insurance companies and not domestic insurance companies is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

These three points were raised and argued before the Tax Commissioner of Ohio and the Board of Tax Appeals of Ohio. Those two bodies ruled against Reserve Life Insurance Company on point 1, and stated that they had no authority to consider questions two and three. These questions were then raised before the Court of Appeals, First Appellate District, State of Ohio, which ruled against Appellant on all three points. The points were then raised by Appellant before the Supreme Court of Ohio which dismissed the appeal on January 22, 1964, "for the reason that no substantial constitutional question exists herein."

Notice of Appeal to the Supreme Court of the United States from the decision of the Supreme Court of Ohio was filed with the Supreme Court of Ohio on March 20, 1964. As a precautionary measure, Notice of Appeal to the Supreme Court of the United States was also filed on March 20, 1964, with the Supreme Court of Ohio, the court possessed of the record, from the judgment of the Court of Appeals, First Appellate District, State of Ohio, affirming the decision of the Board of Tax Appeals.

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 USCA Section 1257(2).

It is submitted that *Wheeling Steel Corp.* v. *Glander*, 337 US 562 (1949), is the principal case which directly sustains jurisdiction herein. The constitutionality of classifying the Appellant as a "Taxpayer" under Section 5711.01 of the Revised Code of Ohio, while domestic insurance companies are excluded from the definition of "Taxpayer" under that Section is directly involved. That statute and the following other relevant Sections of the Ohio Tax Laws are set out in the Appendix: Sections 5705.03, 5711.01, 5711.18, 5711.22, 5725.18, 5725.19, 5725.25, 5729.02 and 5729.03 of the Revised Code of Ohio.

QUESTION PRESENTED

The Tax Commissioner of the State of Ohio, acting pursuant to Ohio statutes, assessed a personal property tax on personal property used in business, for the years 1948 through 1961, inclusive, upon Appellant, a foreign insurance company duly qualified to transact business in Ohio. The statutes of Ohio do not impose this tax or any other personal property tax upon insurance companies incorporated in Ohio. The validity of this assessment was sustained by the Board of Tax Appeals and by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio. The constitutionality of said

tax under the Fourteenth Amendment to the Constitution of the United States was raised before the Tax Commissioner and at each subsequent hearing. Thus, the question presented by this appeal is:

Whether a state statute imposing a tax upon personal property used in business of foreign insurance companies authorized to do business in the state violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, when neither this particular tax nor any other personal property tax is imposed upon domestic insurance companies, although both are subject to the same real estate tax and both are subject to a franchise tax which is always at least 50 per cent higher for the foreign company?

STATEMENT

Initially, there were two cases, one involving the years 1948 through 1960, inclusive, and the other involving the year 1961. The legal issues were identical, and so were the facts, except for the years involved. The cases were heard simultaneously by the General Hearing Board, which is a representative of the Tax Commissioner of Ohio, and were consolidated for hearing by the Board of Tax Appeals, and heard as a single case by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio.

The parties entered into a stipulation of facts, duly filed with the Board of Tax Appeals. The stipulations were identical in the two cases, except for the years involved, and the stipulation in the first case was as follows:

> 1. Reserve Life Insurance Company (hereinafter sometimes referred to as "Reserve") is a legal reserve life insurance company, organized and existing under the laws of the State of Texas. It is a stock company and is owned by its stockholders.

2. Reserve does business in the District of Columbia and all states of the United States except Connecticut, Massachusetts, Michigan, New Jersey, New York and Rhode Island. It first began doing business in Ohio in the fall of 1947, and has continued ever since.

3. Since it began doing business in the State of Ohio, Reserve has annually filed a statement of Condition as of December 31 of each year, in accordance with Section 3909.06 of the Revised Code of Ohio, and has complied with all regulations of the Department of Insurance of the State of Ohio. It has paid its franchise tax annually.

4. Reserve has never paid a personal property tax to the State of Ohio. No request was directed to Reserve to pay such a tax until 1959. Reserve promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it, but supplied the Department of Taxation with valuation of its furniture and fixtures owned by it in the State of Ohio on January 1 for the years 1948 through 1960.

5. If the final determination of this controversy is that the personal property tax on furniture and fixtures is due from Reserve to the State of Ohio, the parties agree that the valuations supplied by Reserve to the State of Ohio for the years 1948 through 1960, by counties, are correct. In this event, the matter shall be referred to the taxing districts, reserving to Reserve full rights of appeal as to the property assigned by the Tax Commissioner to each taxing district.

The stipulation in the second case was identical, except that in paragraphs 4 and 5 the words "for the year 1961" were substituted in place of "for the years 1948 through 1960."

As indicated above, the Board of Tax Appeals held that it had no authority to declare a statute unconstitutional under either the State or Federal Constitution, and, accordingly, did not rule on the constitutional question here

involved. Appellant appealed the decision of the Board of Tax Appeals to the Court of Appeals, First Appellate District, State of Ohio, raising the constitutional issue by assignment of error No. 3, and that Court held that the personal property tax upon Reserve Life Insurance Company did not violate the Constitution of the United States. (See the last paragraph of the Opinion of the Court of Appeals and item 3 of the journal entry of said Court. Appendix p. 11a and p. 2a.) That decision was taken by appeal to the Supreme Court of Ohio, and again Appellant raised the present constitutional issue by assignment of error No. 3. Also as noted above, the latter Court dismissed the appeal "for the reason that no substantial constitutional question exists herein." (Appendix p. 1a)

THE QUESTION IS SUBSTANTIAL

This appeal raises a substantial question with respect to the interpretation of the Fourteenth Amendment to the United States Constitution, and in particular Section 1 of that Amendment.

This case is very similar to another case that came before this Court approximately fifteen years ago, which also involved the personal property tax of Ohio. In that case, this Court laid down the sound, controlling rule which is not being followed by the courts of Ohio in the present instance. That case was *Wheeling Steel Corporation* v. *Glander*, 337 US 562 (1949). There, this Court struck down as violative of the equal protection clause of the Constitution, Ohio's *ad valorem* tax on accounts receivable of foreign, but not domestic corporations, and stated at pages 571-572:

> "Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The State may arbitrarily exclude them or may

> license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. *Hanover Insurance Co.* v. *Harding*, 272 US 494, 507; *Connecticut General Co.* v. *Johnson*, 303 US 77, 79-80. Ohio elected, however, to admit these corporations to transact business and operate manufacturing plants in the State. For that privilege they have paid all that the State required by way of franchise or privilege tax, which includes in its measure the value of all property owned and business done in Ohio. §§ 5495, 5497, 5498, and 5499 of the Ohio General Code. See *International Harvester Co.* v. *Evatt*, 329 US 416. After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. *Hanover Insurance Co.* v. *Harding*, 272 US 494, 510-511; *Power Co.* v. *Saunders*, 274 US 490, 493, 497. Ohio holds this tax on intangibles to be an *ad valorem* property tax. *Bennett* v. *Evatt*, 145 Ohio St. 587, 62 N.E. 2d 345, and in no sense a franchise, privilege, occupation or income tax."

It has been stipulated that Appellant commenced doing business in Ohio in 1947 and has continued to do so ever since. This Court has repeatedly held that, for *ad valorem* tax purposes, the adopted foreign corporation must be treated on a par with domestic corporations if the requirement of equal protection is to be met. *Hanover Fire Ins. Co.* v. *Harding*, 272 US 494 (1926).

A difference in tax may, of course, be justified if it is predicated upon a reasonable basis or a reasonable classification. But, as has been said by this Court, in *Southern R. Co.* v. *Greene*, 216 US 400 (1910) at page 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just re-

lation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

What is the distinction between the tangible personal property owned and used by domestic insurance companies and that owned and used by foreign insurance companies? There can be no distinction in the type of property, or in the use thereof; the only possible distinction is that one company is a domestic one and the other company is a foreign one.

Since the Supreme Court of Ohio did not write an opinion, it is here necessary to analyze the holding of the Court of Appeals. That court, while not denying the difference in taxation, sought to avoid the obvious vulnerability of the present statute by arguing that personal property of a domestic insurance company was "not exempt" from taxation since the tax on its real estate and its franchise tax were "in lieu of" all other taxes. This reasoning will not stand close scrutiny.

Real estate taxes are identical for both kinds of companies, and obviously afford no room for "inclusion" of any kind of equalizing personal property tax burden on domestic companies.

Foreign insurance companies doing business in Ohio pay a franchise tax of 2.50 per cent of the gross premiums derived from business in Ohio for the preceding year. (Ohio Revised Code § 5729.02-.03) Domestic insurance companies pay the lower of two tax computations: Either (a) .002 per cent of the company's reported capital and surplus, less certain liabilities, or (b) .002 per cent of its gross premiums multiplied by eight and one-third. (Ohio Revised Code § 5725.18-.19) It is to be noted that an alternative computation is necessary in order to determine which

method produces the lesser tax for the domestic companies, but not for foreign companies. The second alternative for domestics and the sole method for foreign companies is based on gross premiums, but different rates are applied. For domestic companies, eight and one-third times the premiums is multiplied by two-tenths of one per cent (.002) for a tax rate of 1.67 per cent. For the foreign company, a per cent of 2.50 is applied against the premiums for the particular year. The conclusion is inescapable that *in all cases* the foreign company will pay a franchise tax at least 50 per cent higher (2.50 per cent is 50 per cent higher than 1.67 per cent) than that paid by the domestic insurance company doing the same amount of business. The disparity would be even greater if the computation under the first of the alternatives for domestic insurance companies resulted in a lower figure than the computation under the second alternative, since domestic companies only pay the lower of the two alternatives. Thus, the "in passing" reasoning of the Ohio Court of Appeals (Appendix, p. 8a) that, unlike domestic insurance companies, foreign companies were not subject to "the possibility" of a tax on their entire capital and surplus under the first alternative, which presumably would include the value of personal property, is without substance here where the franchise tax on the foreign company will always be at least 50 per cent more than on the domestic company. "Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 US 64 (1963).

Appellant admits that there are cases which have held that the imposition of one type of tax on a certain type of property "in lieu of" another tax is constitutional, such as *Cincinnati Air Taxi, Inc.* v. *Bowers*, 173 Ohio St. 99 (1962), *Jersey Central Power & Light Co.* v. *Asbury Park*,

128 N.J.L. 141, 24 A2d 526 (1942), and *Landis TWP. v. Division of Tax Appeals*, 137 N.J.L. 224, 59 A2d 258 (1948). In each instance the property or company that is subject to one tax "in lieu of" another is not also subject to the other tax. Here, however, a foreign insurance company pays all the taxes that the domestic insurance company pays and in addition pays a higher rate on the franchise tax, plus a personal property tax. The personal property tax disadvantage to the foreign insurance company is apparent, and cannot be obfuscated by the "in lieu of" language contained in the real estate and franchise taxing provisions. If this taxing structure were permitted to stand, it would be equivalent to stating that Corporation A should pay taxes X, Y and Z, while Corporation B should pay X and Y only and in lieu of Z, and then maintaining that Corporations A and B are taxed equally.

The "final" point made by the Court of Appeals (Appendix, p. 10a) questioning whether the relief sought by Appellant could be granted without new discrimination or new legislation is clearly without merit, and serves only to demonstrate the absence of substance to sustain the tax. Appellant seeks no preferential treatment. On the contrary, the Appellant seeks equality with domestic insurance companies, and for that no new legislation is required. What Appellant does seek is to have the present Ohio personal property tax statute declared unconstitutional as it applies to foreign insurance companies. What follows that would, of course, be up to the Ohio legislature in the first instance.

The Ohio personal property tax is of considerable importance not only to the Appellant but to all foreign insurance companies authorized to do business in Ohio. The book value of Appellant's personal property in Ohio in 1948 (the first year here involved) was approximately $33,000, and it climbed ratably to a high of $110,000 in

1958. Additionally, the records of the Ohio Superintendent of Insurance reflect that as of July 1, 1963, there were 226 foreign life insurance companies and 397 foreign fire and casualty insurance companies authorized to do business in Ohio. The Appellant's situation is clearly not an isolated case. The scope of possible impact is further enlarged when we consider the effect that judicial approval of this unequal *ad valorem* taxation might have upon state taxing structures in general—49 other states might well then consider that they had the green light to impose similar discriminatory *ad valorem* taxes against foreign corporations.

CONCLUSION

We believe that the question presented by this appeal is substantial and of public importance, and that probable jurisdiction should, therefore, be noted.

Respectfully submitted,

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May 15, 1964.

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS
1964 TERM

To wit: Wednesday, January 22, 1964

No. 38415

RESERVE LIFE INSURANCE CO.,

Appellant,

v.

STANLEY J. BOWERS, TAX COMMR.,

Appellee.

Appeal from the Court of Appeals for Hamilton County

ORDER

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant his costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

Appendix B

APPENDIX B

IN THE
COURT OF APPEALS, HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

No. 9222

RESERVE LIFE INSURANCE COMPANY,
Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

JOURNAL ENTRY

This cause came on to be heard as an appeal from the Board of Tax Appeals and was submitted to the Court upon the certified transcript of the record of the proceedings before said Board, and the briefs and arguments of counsel.

Upon consideration whereof the Court finds:

1) The motion of appellee, Stanley J. Bowers, Tax Commissioner of Ohio, is not well taken.

2) The decision of the Board of Tax Appeals is neither unreasonable nor unlawful.

3) The personal property tax upon the Reserve Life Insurance Company does not violate the Constitution of the State of Ohio nor the Constitution of the United States.

It is therefore ordered, adjudged and decreed that the aforesaid motion of appellee to dismiss the appeal herein be, and the same hereby is, overruled. It is further ordered, adjudged and decreed that the decision of the Board of Tax Appeals be, and the same hereby is, affirmed.

The costs herein are taxed against appellant.

To all of which appellant excepts.

It is further ordered that a special mandate issue to the Board of Tax Appeals to carry this judgment into execution.

Approved:

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
By /s/. HARRIS K. WESTON,
Attorneys for Appellant,

/s/ WILLIAM B. SAXBE,
WILLIAM B. SAXBE,
Attorney General,

/s/ DARONNE R. TATE,
DARONNE R. TATE,
Assistant Attorney General,
Attorneys for Appellee.

APPENDIX C

IN THE
COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, No. 9222

RESERVE LIFE INSURANCE COMPANY,
Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

Appeal on Questions of Law, from the Board of Tax Appeals, State of Ohio

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OPINION

(Filed June 10, 1963)

MESSRS. DINSMORE, SHOHL, BARRETT, COATES & DEUPREE, Union Central Building, Cincinnati, Ohio, *for Appellant,*

MESSRS. WILLIAM B. SAXBE and DARONNE R. TATE, State House Annex, Columbus, Ohio, *for Appellee.*

HOVER, P. J.

This is an appeal from the Board of Tax Appeals. The Board determined appellant was subject to taxation on its personal property used in business. This finding approved

ruling of the Tax Commissioner based upon his Rule No. 211 (November 18, 1957), stating in effect that foreign insurance companies are required to make a return of their tangible personal property pursuant to the general taxing statutes of the state of Ohio.

The appellant is Reserve Life Insurance Company organized and existing under the laws of Texas. It is a stock company and has been authorized to conduct an insurance business in the state of Ohio since 1949. Appellant has heretofore claimed and now claims that the tax in question is not authorized by the statutes of Ohio; and that if authorized and levied, is violative of both the state and federal constitutions.

The matter is before this Court by virtue of Section 5717.04 of the Revised Code, which section provides the manner and form of proceedings to obtain a review of decisions of the Board of Tax Appeals.

The Tax Commissioner has filed a motion to dismiss the appeal on the ground that the statute above does not authorize this taxpayer to bring his action in the Court of Appeals for the First Appellate District of Ohio. The taxpayer, in support of his right to appeal to this Court, submits an affidavit to the effect that it maintains a regional executive office in Cincinnati, Ohio; that this office handles all of the company's business conducted in Ohio and various other named states; and that Cincinnati, Ohio is the principal place of business in Ohio for the company. The Tax Commissioner contends that any appeal by a foreign insurance corporation must be either directly to the Supreme Court of Ohio or to the Court of Appeals for Franklin County. The company contends that it is a corporation and as such may appeal to the Court of Appeals for the county in which the corporation has its principal place of business in this state.

Appendix C

The problem is controlled by the Revised Code Section 5717.04 which, in its pertinent portion, reads as follows:

> "The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation or modification shall be by appeal to the court of appeals for Franklin county."

The obvious intent of the legislature in enacting this statute in its present form must be considered. Previously, all appeals from the Board of Tax Appeals were taken directly to the Supreme Court, resulting in an undue burden upon that court. The intent of the statute is clearly to spread the burden of tax appeal litigation. It would seem the instant appeal to this Court is proper on two grounds—(1), at least a portion, and probably the bulk, of the property taxed is situated in this Appellate District; and (2), the corporation does have its principal place of business for the state of Ohio in this District. The provision for bringing tax appeals into the Court of Appeals for Franklin County is obviously intended as a "catch all" for instances not otherwise provided. The multiplicity of conflicting appeals feared by appellee is answered, in regard to corporations at least, by the statutory provision

for combined corporate returns where property is held in more than one county.

For the above reasons, appellee's motion to dismiss the appeal is not well taken and is hereby overruled.

As to the merits of the appeal, it is obvious that appellant is a taxpayer of the state of Ohio as to this specific tax. Section 5711.01 Revised Code includes corporations generally doing business in the state of Ohio. The same section specifically excludes certain businesses from the definition of "taxpayer." Domestic insurance companies are excluded but are noted as "otherwise taxed."

Section 5709.01 of the Revised Code provides that all personal property located and used in business in this state is subject to taxation. Appellant is thus a taxpayer who is liable for a tax upon his personal property used in business in this state. The mere fact that for other purposes peculiar to the insurance business, such personal property is not regarded either as an "asset" or as an "investment" does not affect the clear intention of the legislature to tax the personal property used in business of a foreign insurance corporation authorized to do business in this state.

The specific rule No. 211 of the Tax Commissioner merely restates the law as the statute shows it to be. It would seem to be superfluous since the authority of the Commissioner to define and designate taxpayers is limited to "any taxable property which would not otherwise be required by this section to be returned." As already demonstrated, the section in question defines appellant as a taxpayer, and his property used in business is "taxable property" under these statutes.

Appellant further suggests the argument that it is already taxed by virtue of Section 5729.02 of the Revised

Code at a higher rate of taxation than that levied as a similar tax against competing domestic insurance companies. While appellant admits there is nothing unlawful or unconstitutional in this practice, nevertheless, it should be noted in passing that the foreign company is not, under any circumstances, subject to the possibility of a tax upon its entire capital and surplus as is a domestic corporation.

Appellant, however, claims further that the tax upon his personal property is discriminatory and, as such, unconstitutional since this particular tax is not levied against domestic companies.

If the tax structures with which we are here concerned involve a constitutional question it is not, as already observed, a problem created by Rule No. 211 of the Tax Commissioner. The tax on the personal property of appellant is levied by virtue of statutory enactments which are applicable to all corporations except those excluded by definition in Section 5711.01 (B) of the Revised Code. This exclusion (which is not an exemption because the excluded activities are otherwise taxed) concerns not only domestic insurance companies but other types of businesses where a direct ad valorem personal property tax not only may be neither practical nor just, but also otherwise provided. This is particularly true as regards domestic insurance companies, vis-a-vis foreign companies.

The power to determine the subject and methods of taxation in Ohio within broad constitutional limitations (excepting real estate), is in the General Assembly by virtue of Article One of the Constitution, and Article Twelve Section Two thereof. This includes the power to effect reasonable tax classifications (*State ex. Rel. Struble* v. *Davis*, 132 O. S. 555, and related cases). This applies as well to the power to exempt personal property from taxation.

Appendix C

In regard to the appellant taxpayer and the tax levied against his personal property and not directly against that of a domestic insurance company, it cannot be said that the General Assembly has specifically provided for any exemption in this respect. On the contrary, it is provided in Section 5725.18 of the Revised Code that such domestic companies shall be taxed according to the lesser of two methods and by Section 5725.25 that the tax so levied shall be in lieu of other property taxes, except those upon real estate. Section 5725.18 of the Revised Code taxes either the capital and surplus of domestic insurance companies which of necessity includes a tax on all property actually owned by the company or, in the alternative, a tax upon gross premiums originating in the state. This is the same tax base provided as a franchise tax for foreign insurance companies. The net result is that the question of whether or not this particular tax is discriminatory against this particular taxpayer is not the controlling factor, the applicable principle being whether or not a specific tax is discriminatory between permissible classifications of taxpayers. Whether or not this particular tax system results in tax discrimination in the very narrow sense of one taxpayer paying more than another individual taxpayer, becomes a matter of mathematical calculation individual by individual,—a calculation in which courts are not constitutionally required or even permitted to indulge. The problems existing between foreign and domestic insurance companies in respect of methods and rates of taxation, are recognized by Section 5729.06 of the Revised Code relative to retaliatory tax rates. Here again it would seem that whether or not a particular tax discriminates as between foreign and domestic taxpayers would involve, in addition, a consideration of the tax structure of the state of which the foreign corporation is a resident.

Appendix C

In *City of Xenia* v. *Schmidt*, 101 O. S. 438, the court considers the relationship between the constitutional guarantee of "equal protection of the laws" and the legislative authority to classify. The court states the controlling principle thusly:

> "The test, derived from the doctrines announced in both federal and state courts relative to classification, is this: Is there a real and substantial distinction in the classification attempted, or is it merely artificial, arbitrary or fictitious, made for the purpose of avoiding constitutional requirements? . . . These classifications, so far as they relate to such substantial distinctions, have always been upheld as within the constitutional provisions. Such has not only been the understanding and application in the courts of law, but likewise in the court of the common people in their transactions."

Under all the circumstances apparent in the record here, it cannot be considered that the imposition of an ad valorem tax on the tangible personal property of a foreign insurance company and otherwise taxing domestic insurance companies by the lesser of two formulae is an improper or unlawful classification of taxpayers or discriminatory either for or against the foreign company.

Finally, it is difficult to see how the complaining taxpayer here could lawfully be granted the relief he seeks. Certainly this may not be done by declaring him to be exempt from the particular tax complained of,—distinguishing him from corporate taxpayers generally. Neither this Court nor the Tax Commissioner is authorized to effect tax exemptions by adding words to a statute. Conversely, in order to require domestic insurance companies to pay this tax would involve declaring two separate and distinct

statutes unconstitutional. This the Court might, under some circumstances, be able to do by holding invalid the "in lieu" provision of Section 5725.25 of the Revised Code, but the Court may not itself legislate alleged equality by levying a tax against taxpayers (domestic insurance companies) where no such tax is now levied by the only body constitutionally authorized to do so, i. e., the General Assembly. (Compare *Allied Stores* v. *Bowers*, 166 O. S. 117).

Accordingly, it is the opinion of the Court, (1) that the personal property used in business of the appellant taxpayer is subject to listing and to taxation on the ad valorem basis provided by the general property tax law; and, (2) that the taxing distinction existing between domestic and foreign insurance companies is neither an unreasonable classification of taxpayers nor can it be said to discriminate either in favor of or against the two types of insurance companies; nor, under such circumstances, can it be held violative of the equal protection clause of the constitution.

The decision of the Board of Tax Appeals is hereby affirmed.

HILDEBRANT and LONG, J.J., CONCUR.

APPENDIX D

5705.03 (5625-3). Authorization to levy taxes; collection.

The taxing authority of each subdivision may levy taxes annually, subject to the limitations of sections 5705.01 to 5705.47, inclusive, of the Revised Code, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations of such sections, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules, and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be deposited in its treasury to the credit of the appropriate fund.

5711.01 (5366) (5389-3). Definitions.

[See, in particular, paragraph (B)]

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property

converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

(B) "Taxpayer" means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. The tax commissioner may by regulations define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such regulation shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state.

Taxpayer excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or public utilities, except to the extent they may be required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to make returns as fiduciaries.

(C) "Return" means the taxpayers' annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but fiduciary does not include trustees unless the sense requires that it shall do so.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or the holding or the sale thereof for the purpose of realizing income or profit which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

5711.18 (5389). Valuation of accounts and personal property; procedure; income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, his findings and

recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

5711.22 (5388). Listing and rates of personal property tax.

Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day that they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either division (A) or division (B) of section 5701.06 of the Revised Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the

day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

(A) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all engines, machinery, tools, implements, and domestic animals used in agriculture, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines, machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(1) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(2) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith;

(3) Agricultural products on farms.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other

than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed. (125 v 903. Eff. 10-1-53.)

5725.18 (5414-9). Annual franchise tax on the privilege of being an insurance company.

An annual franchise tax on the privilege of being an insurance company is hereby levied, measured by the smaller of the following bases as applied to a domestic insurance company:

(A) The capital and surplus of a domestic insurance company having capital divided into shares, or the surplus of a domestic insurance company not having capital divided into shares, at the value thereof reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and nonadmitted assets and the liabilities of the company, including in such liabilities:

(1) The reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company because of its outstanding policies in gross;

(2) Amounts set apart for the payment of dividends to policyholders, and all actual liabilities set forth in the annual statement;

(B) Eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year, after making the deductions prescribed by section 5729.03 of the Revised Code for foreign insurance companies. The objects of such tax are those declared in section 5725.24 of the Revised Code, to which only the same shall be applied.

Appendix D

5725.19 (5414-13). Rate of franchise tax on domestic insurance companies.

In the month of June, annually, the auditor of state shall charge for collection from each domestic insurance company a franchise tax of two tenths of one per cent of the amount determined by the superintendent of insurance pursuant to section 5725.18 of the Revised Code and certified to the auditor of state. In no case shall such tax be less than twenty-five dollars.

5725.25 (5414-10). Tax on real estate of domestic insurance company.

The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, shall be in lieu of all other taxes on the other property and assets of such domestic insurance company and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest. Sections 5725.01 to 5725.26, inclusive, of the Revised Code do not assess any tax on any foreign insurance company or affect any tax on a foreign insurance company under any laws of this state.

5729.02 (5432). Annual statements of foreign insurance companies.

Every insurance company incorporated by the authority of another state or government shall set forth in its annual

statement to the superintendent of insurance the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, less return premiums paid for cancellations and considerations received for reinsurance of risks within this state, provided that dividends paid or otherwise allowed to policyholders shall not be deducted except as provided in section 5729.04 of the Revised Code. If the superintendent has reason to suspect the correctness of such statement he may make an examination at the expense of the state of the books of such company or its agents for the purpose of verifying them.

5729.03 (5433). Computation and collection of tax.

If the superintendent of insurance finds the annual statement required by section 5729.02 of the Revised Code to be correct, he shall compute an amount of two and one-half per cent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, and charge such amount to such company as a tax upon the business done by it in this state for the period covered by such annual statement. All taxes collected pursuant to this section shall be credited to the general revenue fund.